Nos. —, —.

In the Supreme Court of the United States

OCTOBER TERM, 1940

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

VIRGINIA ELECTRIC AND POWER COMPANY

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE INDEPENDENT ORGANIZATION OF EMPLOYEES OF THE VIRGINIA ELECTRIC AND POWER COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Solicitor General, on behalf of the National Labor Relations Board, prays that writs of certiorari issue to review the decrees of the United States Circuit Court of Appeals for the Fourth Circuit entered on November 12, 1940, setting aside and refusing to enforce an order issued by the Board against the Virginia Electric and Power Company (Pro. 37).[1]

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[1] The decrees ~~was~~ were entered ~~jointly~~ in two distinct proceedings for review of the Board's order instituted, respectively,

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (Pro. 23–36) is reported in 115 F. (2d) 414. The findings of fact, conclusions of law, and order of the Board (P. A. I, 1–45) are reported in 20 N. L. R. B., No. 87.[2]

JURISDICTION

The decree of the Circuit Court of Appeals was entered on November 12, 1940 (Pro. 37). The

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by the Virginia Electric and Power Company and the Independent Organization of Employees of the Virginia Electric and Power Company, a labor organization found by the Board to be company dominated. In its answer to the petition of the company the Board requested enforcement of its order.

Pursuant to a stipulation of the parties (Pro. 38–39) the record for purposes of the petition for writs of certiorari consists of four volumes. The first and second volumes contain the portions of the record printed in two volumes by Virginia Electric and Power Company as an appendix to its brief in the Circuit Court of Appeals. These are referred to herein as (P. A. I) and (P. A. II), respectively. The third volume of the record consists of the portions of the testimony and exhibits printed by the Board as an appendix to its brief in the court below, referred to herein as (B. A.), and of the appendix to the company's reply brief in the court below, which is not referred to herein. The fourth volume of the record contains the proceedings in the Circuit Court of Appeals and is referred to herein as (Pro.). A certified copy of the transcript of the entire record of the proceeding before the Board has been filed with the Clerk. The typewritten transcript of evidence is referred to herein as (Tr.).

[2] This is a pamphlet copy of the decision and order issued in advance of the bound volume. It is available in the library of this Court.

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. The company, with a long-established policy of opposition toward "outside" labor unions, posted a notice in April 1937 which stated that the employees might be approached by representatives of national labor unions, linked "strikes and unrest" with such unions, praised the labor relations existing during the period when the employees were not represented by any labor organization, and urged the advantages of individual bargaining. Shortly thereafter the company called a meeting of its employees at which the president of the company read a message urging the employees to form a labor organization with which the company might bargain; the message plainly implied, although it did not expressly state, that an "inside" union was desired by the management. This message resulted in the organization, with the obvious approval of the management, of such a union. The questions presented are whether the National Labor Relations Board could validly find that the company violated Section 8 (2) and (1) of the National Labor Relations Act with respect to the labor organization so formed, and that the

posting of the notice constituted a violation of the Act.[3]

2. Whether anti-union threats and surveillance of union meetings by a supervisory employee having power to assign work and discipline employees afford sufficient basis for an order by the Board requiring the employer to cease and desist from such practices.

3. Whether, upon findings that an employer has interfered with, dominated, and supported a labor organization of its employees, has entered into an agreement with that organization providing for a closed shop and a check-off of union dues, and pursuant to that agreement has deducted various sums of money from the wages of its employees and has paid those sums over to the labor organization, the

[3] The Company entered into a closed-shop contract with the labor organization in question, and pursuant to that contract discharged two of its employees who refused to join the organization. If the Board's finding that the company violated Section 8 (2) with respect to the organization is valid, it is plain that the closed-shop contract was invalid, and that, as the Board found, the two discharges were in violation of Section 8 (3). Hence, if the Court grants this petition the Board will ask that its order with respect to these two employees be enforced.

The Board also found that two other employees were discharged for union membership or activities. The court below set aside these findings as unsupported by evidence (Pro. 34–35). Since the evidence on this issue bears upon the question whether the company violated Section 8 (2) with respect to the inside organization, we will also ask the Court, if this petition is granted, to review the sufficiency of the evidence as to these two employees.

Board may require, as affirmative action appropriate to effectuate the policies of the Act, that the employer reimburse the employees for the amounts thus deducted from their wages.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

Upon the usual proceedings the Board issued its findings of fact, conclusions of law, and order. Omitting jurisdictional findings, the facts, as found by the Board and as shown by the evidence, may be summarized as follows:[4]

During 1922 the Virginia Electric and Power Company, hereafter called the Company, which operates electric, gas, and transportation utilities in eastern Virginia and northeastern North Carolina, broke a strike called by the Amalgamated Association of Street, Electrical, and Motor Coach Employees of America, an affiliate of the American Federation of Labor (P. A. I, 12; P. A. I, 362–364).[5] Shortly after enactment of the National Industrial Recovery Act, Section 7 (a) of which guaranteed

[4] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

[5] From 1922 to 1937 the Company's employees were not represented by any labor organization (Bd. Exh. 3, pp. 6–7, *infra*).

to employees freedom of self-organization and the right to select their own collective bargaining representatives, President Holtzclaw of the Company informed the employees in a speech that the management believed that "organization of our employees for any purpose * * * is entirely unnecessary" (P. A. 1, 12; P. A. I, 467–468, Resp. Exh. 36). Until May 1937 the Company implemented its antiunion policy through the use of a full-time labor spy furnished by the Railway Audit and Inspection Company (P. A. I, 14n; B. A. 3–5, 21–23, 27–28). During 1936 E. L. Bishop, superintendent of the transportation division at Norfolk, interrogated a number of employees concerning rumored organizational activity (P. A. I, 13; P. A. I, 438–439, B. A. 10–11, 51–52).[6]

In March or April 1937, the A. F. of L. initiated efforts to organize the Company's employees (P. A. I, 12–13; P. A. I, 469–471, P. A. II, 896). On April 26, 1937, the Company posted on bulletin boards throughout its enterprise the following notice (P. A. I, 15–16; Bd. Exh. 3, P. A. I. 52):

> TO EMPLOYEES OF THE COMPANY:
>
> As a result of recent national labor organization activities and the interpretation of the Wagner Labor Act by the Supreme Court, employees of companies such as ours may be approached in the near future by repre-

[6] It was to Bishop that the undercover operative referred to above reported on labor matters (P. A. I. 437–438).

sentatives of one or more such labor organizations to solicit their membership. Such campaigns are now being pressed in various industries and in different parts of the country and strikes and unrest have developed in many localities. For the last fifteen years this Company and its employees have enjoyed a happy relationship of mutual confidence and understanding with each other, and during this period there has not been any labor organization among our employees in any department, so far as the management is aware. Under these circumstances, we feel that our employees are entitled to know certain facts and have a statement as to the Company's attitude with reference to this matter.

The Company recognizes the right of every employee to join any union that he may wish to join, and such membership will not affect his position with the Company. On the other hand, we feel that it should be made equally clear to each employee that it is not at all necessary for him to join any labor organization despite anything he may be told to the contrary. Certainly there is no law which requires or is intended to compel you to pay dues to, or to join any organization.

This Company has always dealt with its employees in full recognition of the right of every individual employee, or group of employees, to deal directly with the Company with respect to matters affecting their inter-

> ests. If any of you, individually or as a group, at any time have any matter which you wish to discuss with us, any officer or department head will be glad, as they always have been, to meet with you and discuss them frankly and fully. It is our earnest desire to straighten out in a friendly manner, as we have done in the past, whatever questions you may have in mind. It is reasonable to believe that our interests are mutual and can best be promoted through confidence and cooperation.
>
> (Signed) J. G. HOLTZCLAW,
> *President.*

The Board found that this notice was an appeal to the employees to bargain with the Company directly, without the intervention of any "outside" union (P. A. I, 17). Several groups of the employees responded to this plea by submitting demands for increased wages and improved working conditions (P. A. I, 17; P. A. 56–58). In the middle of May the Transport Workers Union, an affiliate of the C. I .O., started to organize the Norfolk transportation employees (P. A. I, 13; P. A. I. 128–129, 177–180, 238–239). About the same time supervisors throughout the system instructed the employees under them to select representatives to attend meetings at which a Company official would speak; the employees complied (P. A. I, 17; P. A. I, 53–56, 260–262, 345–347, P. A. II, 613–614, 881). Two meetings were held simultaneously on May 24 in the company's office buildings in Rich-

mond and Norfolk; President Holtzclaw addressed the Richmond meeting and Vice President R. J. Throckmorton spoke to the employees at Norfolk (P. A. I, 17–18; P. A. I, 89–90, 412–413). Each official read an identical message to the assembled delegates.[7] The message was as follows (P. A. I, 18–19; P. A. I, 53, Bd. Exh. 4):

> A substantial number of its employees representing various departments and various occupations have approached the Company with the request that the Company consider with them the matter of their working conditions and wages. In other words, they have requested collective bargaining. The Company's position with respect to this was recently stated in a posted bulletin.
>
> In a Company such as ours, if an individual operator for example should ask for himself better working conditions or wages, this Company could not comply with his request without also making the same concessions to other similar operators. In such a case the operator who appealed individually would, as a practical matter, be bargaining collectively for all of his group, which is not the logical procedure.
>
> This Company is willing to consider the requests mentioned above but feels that in

[7] There is testimony that Holtzclaw prefaced his reading of the message by referring to strikes and disorders throughout the country and by stating that he wanted the employees to know how the Company felt about union activities (P. A. I, 90–91, 109).

fairness to all of its employees and to itself, it should at the same time consider other groups who have not yet come to it. If the approaching negotiations are to be intelligent and fair to all properly concerned, they should be conducted in an orderly way and all interested groups should be represented in these discussions by representatives of their own choosing as provided in the Wagner National Labor Relations Act, which provides as follows: [quoting Section 7 of the Act].

The Wagner Act applies only to employees whose work is in or directly affects interstate commerce and to companies engaged in interstate commerce. Counsel for this Company advise us that in their opinion the provisions of the Act do not apply to local transportation employees, to gas employees in Norfolk, or to certain strictly local employees of the light and power department. In spite of this, the Company wants to make it perfectly clear that its policy is one of willingness to bargain with its employees in any manner satisactory to the majority of its employees and that no employee will be discriminated against because of any labor affiliations he desires to make.

The petitions and representations already received indicate a desire on the part of these employees at least to do their own bargaining, and we are taking this means of

> letting you know our willingness to proceed with such bargaining in an orderly manner. In order to progress, it would seem that the first step necessary to be taken by you is the formation of a bargaining agency and the selection of authorized representatives to conduct this barganing in such an orderly manner.
>
> The Wagner Labor Act prohibits a company from "dominating or interfering with the formation or administration of any labor organization or contributing financial or other support to it."
>
> In view of your requests to bargain directly with the Company and in view of your right to self-organization as provided in the law, it will facilitate negotiations if you will proceed to set up your organization, select your own officers and supervisors, adopt your own by-laws and rules, and select your representatives to meet with the company officials whenever you desire.

At the Richmond meeting Holtzclaw announced that any increase in wages arrived at by collective bargaining would become effective as of June 1 (P. A. I, 19; P. A. I, 74–75, 479). Both Holtzclaw and Throckmorton told the assembled representatives that they could remain in the auditoriums for further discussion of the matters raised in the message (P. A. I, 20; P. A. I, 63, 301, 367, B. A. 29). The representatives did so (P. A. I, 20; P. A. II, 657–658, 840–841, 892–893, B. A. 46–47).

The Board concluded that at the May 24 meeting the Company "urged its employees to organize and to do so independently of 'outside' assistance * * *" and gave the initial impetus to formation of a system-wide labor organization[8] (P. A. I, 20–21).

During the days immediately following delivery of the Company's message, meetings of the employees were held upon company premises in the various departments (P. A. I, 21; P. A. II, 659–661, 819, 833–834, 882–883, 896–897, 908–909).[9] At

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[8] The message read on May 24 (*supra*, pp. 9–11) stated that "all interested groups should be represented" in the discussions with the company, "that the first step to be taken by you is the formation of a bargaining agency," and that "it will facilitate negotiations if you will proceed to set up your organization, select your own officers and supervisors, adopt your own bylaws and rules, and select your representatives to meet with the company officials whenever you desire." That Holtzclaw contemplated only a system-wide organization is indicated by his testimony that he promised the wage increase for June 1 because to get 3,500 employees "of one mind as to what sort of a bargaining agency they wanted" might be a long drawn out process (P. A. I, 479–480; see P. A. I, 364–366). The national labor organizations confined their organizational campaigns to specific portions of the Company's wide-flung organization: the A. F. of L. appeared at Richmond, the Transport Workers Union and the Amalgamated among the transportation employees at Norfolk, and the International Brotherhood of Electrical Workers among the employees in the electrical division at Norfolk (P. A. I, 12, 13; P. A. I, 178, 211–212, 470–471, 498–499).

[9] Notices of these meetings were posted on the company's bulletin boards with the Company's permission (P. A. II, 897, Tr. 4676, 4743) and superintendents of various plants and

these meetings the Company's message was reported to the employees and it was determined to form an inside organization; representatives were selected and thereafter convened on company property at Richmond, Norfolk, and Petersburg on June 1, 3, 7, 9, 11, and 14 to accomplish this purpose (P. A. I, 21–22, 25; P. A. I, 120; P. A. II, 770, 823–824, 946, 1003–1008, 1035–1043, B. A. 41–42). On June 15 the constitution and bylaws of the Independent Organization of Employees of the Virginia Electric and Power Company, hereafter called the Independent, were adopted by the representatives (P. A. I, 22; P. A. II, 771–772, 1026–1033).

During the crucial period between May 24 and June 15 the Company took other action calculated to cause the employees to follow the path it had pointed out to them. Edwards, a supervisor in the Norfolk transportation division, maintained surveillance of meetings of the Transport Workers Union and warned employees that they would keep "messing with the C. I. O." until they lost their jobs (P. A. I, 13–14; P. A. I, 129–130, 177–180, 237–238; B. A. 10, 13–15, 16–18). Everard Mann, an employee who openly protested against an "inside union" at a meeting of employees, and pro-

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departments cooperated with the organizers in providing meeting places and arranging for the employees to be present (P. A. I, 21; P. A. II, 764, 893–894, 897–899, B. A. 39–40, 41, 48–49). Many employees left their work to attend these meetings (P. A. II, 862–863, 893–894, 898–899, B. A. 46, 47, 49).

posed that the employees join a national organization, was discharged by Superintendent Bishop on June 1; the Board found that Mann's discharge violated Sections 8 (3) and (1) of the Act (P. A. I, 27–29; P. A. I, 157–158, 161–162, 395, 417, 419, 430–433; B. A. 14).

After adoption of the Independent's constitution and bylaws, application cards were distributed, signed, and collected throughout the Company's entire system, many of them on company time and property (P. A. I, 23; P. A. I, 174, 204; P. A. II, 774–775; B. A. 8–9, 19, 20). On July 19 the Independent claimed to represent a majority of the employees and on August 5 a contract was concluded between the Company and the Independent providing, *inter alia*, for a closed shop, the check-off of Independent dues, and a wage increase (P. A. I, 23–24; Bd. Exh. 9, P. A. II, 923–943). On August 20 the Company paid $3,784.50 to the Independent pursuant to the check-off provision, although the Company had not yet deducted this entire amount from the employees' wages (P. A. I, 24; Bd. Exh. 53, P. A. II, 992). Thereafter the Company notified all employees that they must join the Independent to retain their jobs (P. A. I, 24–25; P. A. II, 991–992); A. F. Staunton and Robert E. Elliott, Jr., refused to do so and were discharged (P. A. I, 29–33; P. A. I, 189, 192, 283, P. A. II, 590–591).

Upon these findings, the Board concluded that the Company had dominated and interfered with the formation and administration of the Independent in violation of Section 8 (2) and (1) of the Act (P. A. I, 26–27); that by posting the April 26 bulletin, as well as through the activities of Superintendent Bishop and Edwards, the Company had interfered with its employees in the exercise of their right of self-organization, thus violating Section 8 (1) of the Act (P. A. I, 14, 17), and that by discharging Mann, Staunton, Elliott, and T. N. Harrell, Jr.,[10] the Company had violated Section 8 (3) and (1) of the Act (P. A. I, 29, 30, 32, 35). The Board ordered the Company to cease and desist from these unfair labor practices and from giving effect to its contract with the Independent, to withdraw all recognition from and completely disestablish the Independent as a representative of any of its employees, to reinstate with back pay the four employees who were discriminatorily discharged,[11]

[10] Harrell, an extremely active member of the International Brotherhood of Electrical Workers who made no secret of his opposition to an "inside" organization and criticized the Independent, was discharged in March 1938, under circumstances which, in the Board's opinion, proved that his activity on behalf of the International Brotherhood was the cause (P. A. I, 33–35; P. A. I, 211–212, 227–228).

[11] The back-pay provisions of the Board's order contain a "work relief" provision which is invalid under the decision of this Court in *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7. We do not, of course, ask

to reimburse each of its employees who was a member of the Independent in the amount of dues and assessments checked off his wages by the Company on behalf of that organization, and to post appropriate notices (P. A. I, 41–45).

Thereafter, the Company and the Independent filed separate petitions in the court below to review and set aside the Board's order (Pro. 1–16). The Board answered and petitioned for full enforcement of its order against the Company (Pro. 18–22). On November 12, 1940, the court handed down its opinion and entered a decree denying enforcement to any part of the Board's order and setting aside the entire order (Pro. 23–37).

REASONS FOR GRANTING THE WRIT

1. The basis upon which the court below denied enforcement to and set aside the Board's order with respect to the Independent presents, we believe, a question of general importance in the administration of the National Labor Relations Act. The court below did not deny finality to the Board's subsidiary findings of fact with respect to the origin of the Independent,[12] but set aside the Board's

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review of the decree below in so far as they denied enforcement to this provision of the order.

[12] Thus the court agreed with the Board that the Company had been hostile to "outside" unions (Pro. 25); that Superintendent Bishop had interrogated employees concerning union organization, in violation of the Act (Pro. 25, 35–36); that the Company tried to discourage organization

order because it deemed the facts found by the Board insufficient, as a matter of law, to spell out the domination, interference, or support which Section 8 (2) and (1) of the Act proscribe. The gist of the court's decision, we believe, is to be found in its statement that—

> If the company desired an inside, as opposed to an outside union, it did not say so; and the fact that the employees may have gathered that impression from past dealings with the company cannot supply the element of domination or interference which the Act proscribes. Cf. *L. Greif & Bro.* v. *N. L. R. B.*, 4 Cir., 108 F. (2d) 551. (Pro. 31–32).

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of its employees after enactment of the National Industrial Recovery Act (Pro. 26); that the bulletin of April 26 and the message of May 24 "led to organizational activities on the part of the employees" (Pro. 25); that the Company assembled the employees on May 24 "and explained to them its desire for collective bargaining" (Pro. 31); that the purpose of the Company's message was to point out to the employees "the desirability of their choosing agents for the purpose of collective bargaining" (Pro. 27); that the Independent "came into being as a result of the May 24th meetings" (Pro. 30); that the Independent "was set up as a bargaining agency within a few weeks of the May 24th meeting" (Pro. 32); that "meetings of the employees looking to organization of the [Independent] were held on the Company's premises, that its bulletin boards were used for posting notices of these meetings and its telephone line between Richmond and Norfolk were used in connection therewith" (Pro. 30); and that the wage increase forecast by President Holtzclaw at the Richmond meeting on May 24 "doubtless did expedite the process" (Pro. 32).

This principle has been applied by the court below in four successive decisions, including the present one, in each of which the court set aside orders of the Board based upon findings that conditions fairly attributable to the employer canalized the employees' choice in the direction of a particular labor organization. *L. Greif & Bro.* v. *National Labor Relations Board,* 108 F. (2d) 551 (C. C. A. 4); *National Labor Relations Board* v. *Mathieson Alkali Works, Inc.,* 114 F. (2d) 796 (C. C. A. 4); *E. I. du Pont de Nemours & Co.* v. *National Labor Relations Board,* decided December 27, 1940 (C. C. A. 4). In none of those cases did the employer expressly announce that he wished the employees to form an inside labor organization but in each, we think, the facts found by the Board and accepted by the court warranted a conclusion that the employer had created circumstances which rendered difficult, if not impossible, the choice of any representative other than the one favored by him. The repeated failure of the court below to realize that there are more subtle, but equally effective, means whereby an employer may obtain adherence by his employees to a particular labor organization than through a bald announcement that that is what he desires (cf. *National Labor Relations Board* v. *Link-Belt Co.,* Nos. 235, 236, this Term, decided January 6, 1941), places the protection of the rights of self-organization and collective bargaining through enforcement of Section 8 (2) of the Act in substantial jeopardy within the Fourth Judicial Circuit.

The decision below is plainly inconsistent with principles laid down by this Court in passing upon employer activities found by the Board to constitute violations of Section 8 (2) of the Act. The industrial espionage, discriminatory discharges, and anti-union statements held by this Court to evidence employer hostility toward "outside" unions in *National Labor Relations Board* v. *Link-Belt Co.*, Nos. 235, 236, this Term, decided January 6, 1941, all find their counterparts here (*supra*, pp. 6–8); indeed, the Company's hostility toward "outside" organizations was recognized by the court below (note 12, pp. 16–17, *supra*). Such hostility is plainly one of the "conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates." *Link Belt* case, *supra*.[13] Yet the court below did not permit

[13] See, also, *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board*, 114 F. (2d) 930, 938 (C. C. A. 1); *National Labor Relations Board* v. *H. E. Fletcher Co.*, 108 F. (2d) 459, 466 (C. C. A. 1), certiorari denied, 309 U. S. 678; *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. (2d) 61, 68 (C. C. A. 2), modified and affirmed, 309 U. S. 629; *Western Union Telegraph Co.* v. *National Labor Relations Board*, 113 F. (2d) 992, 996 (C. C. A. 2); *Westinghouse Electric & Manufacturing Co.* v. *National Labor Relations Board*, 112 F. (2d) 657, 660 (C. C. A. 2), certiorari granted, No. 447, this Term; *Titan Metal Mfg. Co.* v. *National Labor Relations Board*, 106 F. (2d) 254, 257 (C. C. A. 3), certiorari denied, 308 U. S. 615;

the Board to accord any weight to the setting in which the Company's actions, expressly and admittedly undertaken to bring about the selection of a bargaining representative, occurred.

Even, however, on the test laid down by the court below, that the employer must have put into words his desire for an inside union (*supra*, p. 17), the Board's order should have been enforced. At the unprecedented meeting of employee delegates called by the Company for the express purpose of bringing about the selection of a bargaining representative, high officials of the Company read a message urging the delegates to undertake "the formation of a bargaining agency * * * [to] select your own officers and supervisors, adopt your own bylaws and rules, and select your representatives * * *" (*supra*, p. 11). The finding of the Circuit Court of Appeals (Pro. 31) that this did not

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National Labor Relations Board v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 870 (C. C. A. 5), certiorari denied, 310 U. S. 651; *Atlas Underwear Co.* v. *National Labor Relations Board*, decided January 15, 1941 (C. C. A. 6); *National Labor Relations Board* v. *Rath Packing Co.*, 115 F. (2d) 217, 219–220 (C. C. A. 8); *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. (2d) 340, 346–347 (C. C. A. 8); *National Labor Relations Board* v. *Swift & Co.*, 116 F. (2d) 143 (C. C. A. 8); *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652, 658 (C. C. A. 9); *Continental Oil Co* v. *National Labor Relations Board*, 113 F. (2d) 473, 481 (C. C. A. 10), certiorari granted limited to another point, No. 413, this Term; *Magnolia Petroleum Co.* v. *National Labor Relations Board*, 115 F. (2d) 1007, 1010, 1012 (C. C. A. 10).

indicate that the employees should form an independent organization does violence to the language: the words plainly meant a new organization, not one of those already engaged in organizing the plant."[14] Further, the words cannot be removed from their setting. The employees could not possibly have understood that the Company, in initiating selection by them of a bargaining representative, intended that they be genuinely free to select whatever organization they wished. The Company was concededly and openly hostile to national labor organizations. It had implemented that policy by espionage, surveillance, interrogation as to union activities, and direct threats to its employees. It had met the decisions of this Court upholding the Act and the ensuing organizing efforts of national labor organizations with a notice to the employees (*supra*, pp. 6–8) linking such organizations with "strikes and unrest" and emphasizing the "happy relationship" that had existed for the last fifteen years, during which "there has not been any labor organization among our employees in any department, so far as the management is aware." There is testimony that a high official of the Company, Superintendent Bishop, had urged the Norfolk transportation employees to form an "inside" organization through which, he said, they could accomplish

[14] In addition, none of the "outside" unions was organizing on the system-wide basis which the Company indicated as the basis for future bargaining (note 8, p. 12, *supra*).

more than through an "outside" union because the Company would not recognize a representative of the latter type (B. A. 7–8, 10, B. A. 11–12, 18–19, 29–31, P. A. I, 113). Under such circumstances, the meaning of the message, clear from the words themselves (*supra*, pp. 20–21), must have been utterly unmistakable to the employees. There is testimony that they understood that the Company wanted an inside union (B. A. 8, 34–35).

The patent indications that the Company favored an "inside" union and wanted the employees to form one, were multiplied during the Independent's organizational period and were effective in obtaining employee support for the new organization. Liberal use of company property and facilities was made by the organizers (*supra*, pp. 12–13); supervisors cooperated in arranging the organization meetings and for attendance by the employees during working hours (note 9, p. 12, *supra*), and the Company, with alacrity, promised to furnish the organizers with a list of all employees (B. A. 54–57). President Holtzclaw's promise with respect to a wage increase (*supra*, p. 11) was used as an argument in favor of forming the Independent (P. A. I, 111–112, B. A. 8, 48). Widespread solicitation of members on company time and property ensued without let or hindrance (*supra*, p. 14).[15] In the midst of the campaign Mann, the

[15] In March 1937 an A. F. of L. organizer sought to organize the employees of the Company's power plant in

most outspoken opponent of "inside" unions, was discharged (*supra*, pp. 13–14)[15] and Supervisor Edwards threatened employees with discharge if they continued "messing with the C. I. O." (*supra*, p. 13). These potent forms of support led to their natural and predetermined conclusion: the Independent enlisted a majority of the employees and, as part of a now familiar pattern, the Company promptly entered into a contract with the Independent containing closed-shop and check-off provisions, terms which are almost invariably opposed by employers who are hostile to truly independent labor organizations.

Norfolk: President Holtzclaw issued instructions that his organizing activities could not be pursued either on company time or on company property (P. A. I, 377–378, 404, 470).

[15] In setting aside the Board's findings as to Mann without discussion of the evidence, the Circuit Court of Appeals stated in its opinion that "It is hardly probable that he would have been discharged for union affiliation or activity when the company was proceeding so carefully to avoid the appearance of evil" (Pro. 34). Compare the similar inference indulged by the court in *National Labor Relations Board* v. *Mathieson Alkali Works, Inc.*, 114 F. (2d) 796, 803 (C. C. A. 4) as a basis for setting aside the Board's order: "Respondent was certainly outwardly assuming a position of neutrality and was forbidding its supervisory employees to interfere with the right of self-organization on the part of the workers. It was advised from the beginning by able counsel. If it had sought to engage in secret interference, it certainly would not have resorted to the bungling acts on the part of the foremen which the evidence discloses." Apparently with the court below crudity and subtlety alike give rise to an inference unfavorable to the Board's findings.

If these facts, which were found by the Board and, for the most part, accepted by the Circuit Court of Appeals (note 12, pp. 16–17, *supra*), do not spell out the interference and support which Section 8 (2) proscribes, a broad avenue is opened for employers to take the initiative in forming labor organizations acceptable to them and to bring to bear upon the employees' exercise of their right of self-organization the full weight of the employer's superior economic power. The means adopted by the Company in the present case were so readily effective to achieve the results which they were plainly intended to produce, that legalization of those means under principles which appear to be settled in the court below (*supra*, p 18) would materially endanger the clear Congressional purpose,[17] effectuated by repeated decisions of this Court,[18] to remove the company union from its dominant position as a means of denying to employees freedom

[17] Senate Report No. 573, 74th Cong., 1st Sess., pp. 10–11; House Report No. 1147, 74th Cong., 1st Sess., pp. 17–19.

[18] *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *National Labor Relations Board* v. *Newport News Co.*, 308 U. S. 241. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350; *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S.

of choice in the selection of their bargaining representatives. The question presented, we submit, is one of public importance.

2. The Circuit Court of Appeals held that, despite the admitted supervisory status of Edwards, which included a power to assign work and discipline employees (Tr. 789–790), his surveillance of union meetings and threats that employees would be discharged if they continued "messing with the C. I. O." (*supra*, p. 13) did not constitute unfair labor practices by the Company because they were "contrary to the policy of the company and were clearly nothing more than the utterance of his individual views" (Pro. 35). This important holding was based upon the principles laid down by the same court in the *Mathieson Alkali* case, *supra*, that to justify a cease and desist order it must be shown that coercive activities by supervisory employees were engaged in with the authorization or approval of the employer. The holding is contrary to the decisions of this Court in *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 79–81; *H. J. Heinz Co.* v. *National Labor Relations Board*, No. 73, this Term, decided January 6, 1941; and *National Labor Relations Board* v. *Link-Belt Co.*, Nos. 235, 236, this Term,

318; *National Labor Relations Board* v. *Link-Belt Co.*, Nos. 235, 236, this Term, decided January 6, 1941; *H. J. Heinz Co.* v. *National Labor Relations Board*, No. 73, this Term, decided January 6, 1941.

decided January 6, 1941, and is in conflict with numerous decisions of the Circuit Court of Appeals.[19]

3. The Board's order in the present case contains a provision requiring the Company to reimburse each employee in an amount equal to the dues and assessments checked off his wages by the Company and paid over to the Independent. A like form of relief has been ordered by the Board since June 1938 in all cases in which it has found a violation of Section 8 (2) of the Act, and in which there was a check-off agreement between the employer and the dominated union. The validity of this provision presents, we submit, a question of importance in the administration of the National Labor Relations Act.

In the present case, in the Board's view, the employer established in its plant a company union which became the employees' representative by reason of employer sponsorship, not because they freely chose it. The employer then buttressed the position of its nominee by concluding a closed-shop contract which illegally forced the employees to acquiesce in the management's selection of representatives, and assured the organization's financial stability by instituting a check-off. Under these

[19] See the cases collected in our brief in the *Machinists* case, pp. 32–37, and *Oughton* v. *National Labor Relations Board*, decided November 19, 1940 (C. C. A. 3).

circumstances, the moneys paid over to the Independent by petitioner constituted a forced tribute levied upon the employees for maintenance of the very instrument whereby the Company foreclosed any genuine exercise of the rights of self-organization and collective bargaining. We submit that the provision requiring reimbursement to the employees of dues and assessments checked off their wages by the Company was plainly not an abuse of the Board's "judgment and discretion * * * in choosing the particular affirmative relief to be ordered." *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265, 271; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82.

The provision in question was set aside as not authorized by the Act, although the Board's findings of company interference, domination and support were approved and other portions of the Board's order based upon such findings were enforced, in *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. (2d) 340, 348 (C. C. A. 8); *National Labor Relations Board* v. *Greenebaum Tanning Co.*, 110 F. (2d) 984, 988–989 (C. C. A. 7), certiorari denied, No. 152, this Term; *A. E. Staley Mfg. Co.* v. *National Labor Relations Board*, decided November 14, 1940 (C. C. A. 7); *Western Union Telegraph Co.* v. *National Labor*

Relations Board, 113 F. (2d) 992, 997–998 (C. C. A. 2); and *National Labor Relations Board* v. *West Kentucky Coal Co.,* decided November 15, 1940 (C. C. A. 6). The result of those decisions is that an employer who chooses to establish and maintain an illegal labor organization as a means of forestalling genuine self-organization until such time as the Board can issue an order and the courts enforce it, is free to foist the cost of maintenance upon the employees, without fear that he may be required to refund that cost to them in addition to ceasing his illegal conduct.

CONCLUSION

The decision of the court below with respect to what conduct by employers constitutes interference with and support of a labor organization, departs from the principles laid down by this Court and widely followed by the other Circuit Courts of Appeals. In this respect the decision, which is one of a series of similar decisions by the court below, raises a question of public importance concerning enforcement of the National Labor Relations Act in the Fourth Judicial Circuit. In addition, the court's ruling as to the employer's responsibility for the activities of a supervisory employee are contrary to decisions of this Court. Finally, the question concerning the validity of the provision requiring reimbursement of the employees for

money checked off their wages in payment of dues to the company union, is of importance in the administration of the Act. For these reasons, we submit that this petition for writs of certiorari should be granted.

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National Labor Relations Board.

FEBRUARY 1941.

APPENDIX

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449 29 U. S. C., Supp. V, Sec. 151, *et seq.*):

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712),

as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

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(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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